



# Vermont State Ethics Commission

Paul Erlbaum, Chair  
Chris Davis, Commissioner  
Sarah Vangel, Commissioner  
Michele Eid, Commissioner  
Sarah Butson, Commissioner  
Christina Sivret, Executive Director

Vermont State Ethics Commission  
6 Baldwin Street  
Montpelier, VT 05633-7950  
(802) 828-7187  
<https://ethicscommission.vermont.gov/>

## Advisory Opinion No. 3-2023

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### SUMMARY

When a State of Vermont public servant holds leadership positions in two State entities that have overlapping interests in a matter, it is not a conflict of interest for the public servant to work on the matter for either or both entities, provided that the public servant, a member of the public servant's immediate family or household, or a business associate, have no direct or indirect interest in the outcome of the matter.

However, even in the absence of an actual conflict, if one of the entities has a particular interest in the outcome of the matter, the appearance of a conflict of interest may still arise. To avoid the appearance of a conflict, the public servant should either (1) recuse themselves from all involvement in the matter, or (2) recuse themselves from involvement in the matter with one of the entities, and only proceed to work on the matter for the other entity after complying with State Code of Ethics disclosure and recusal procedures.

### ISSUE

*Whether a conflict of interest, or the appearance of a conflict of interest, exists under the State Code of Ethics when a State of Vermont public servant holds separate leadership positions with two State entities, those entities have overlapping interests regarding a particular matter, and the public servant recuses themselves from any involvement in the matter with one of the entities, but continues involvement in the matter with the other entity.*

## BACKGROUND and FACTS

The Requester is the Deputy Commissioner of the Department of Housing and Community Development (DHCD) and also serves as the Chair of the Board of Commissioners of the Vermont State Housing Authority (VSHA), a quasi-state entity. He has advised the Ethics Commission that the VSHA is contemplating a merger with the Vermont Housing Finance Agency (VHFA), another quasi-state entity. He has further advised the Commission that DHCD has expressed support for the merger of the two entities, and recently set aside \$50,000 in its budget to assist VSHA and VHFA fund a study of the potential merger. The purpose of study is to determine whether the merger of VHFA and VSHA is in the best interest of the agencies and, if so, how the merger might be implemented. If the study shows that a merger is in agencies' best interests, negotiations will ensue with the ultimate purpose of merging the two agencies. If the merger goes forward, the State, and particularly DHCD, will be a party to merger discussions.

The Requester attests that his Board position with the VSHA pre-dates his appointment to DHCD by several years; both VSHA and VHFA are non-profits; the State does not compete with either entity for financing or the provision of services; DHCD does not oversee VSHA or VHFA, except to the extent that DHCD occasionally allocates funding allocated by the Legislature to either VSHA or VHFA as sub-grantees to implement programs, and ensures that grant or subgrant guidelines are followed; VSHA is managed by an executive team under the leadership of an Executive Director who reports to the VSHA Board of Commissioners; the Governor makes appointments to the VSHA Board, but it is an independent body and is not directed by the Governor or any other party in any way; and the State has no financial interest in either VSHA or VHFA, other than to see that the public receives the most benefit possible from the two entities.

If the merger goes forward, the Requester would like to participate in the discussions in his role as Chair of the VSHA Board, and not on behalf of DHCD. He seeks an Advisory Opinion as to whether his proposed course of action presents a conflict of interest under the Vermont Code of Ethics. Even if the proposed action does not present an actual conflict of interest, the Requester seeks an opinion as to whether the scenario above presents the appearance of a conflict under the Code. If the situation presents either a conflict of interest, or the appearance of one, the Requester has proposed several mitigating actions to address the conflict (or appearance). The Requester seeks advice as to whether those proposed actions would adequately address any conflict, or any appearance of one.

## ANALYSIS

When asked to consider whether a conflict of interest or the appearance of one exists under the State Code of Ethics, each case must be analyzed on its own merits in conjunction with the applicable provisions of the State Code of Ethics. The mere fact that a public servant holds leaderships positions in two State entities with overlapping interests does not necessarily mean the situation creates a conflict. In this case, we consider whether a conflict of interest or the appearance of one exists, and, if so, what course of action the Requester should take to comply with the Code's conflict of interest provisions.

### **§ 1203(a)(1). CONFLICT OF INTEREST; APPEARANCE OF CONFLICT OF INTEREST**

*("In the public servant's official capacity, the public servant shall avoid any conflict of interest or the appearance of a conflict of interest. The appearance of a conflict shall be determined from the perspective of a reasonable individual with knowledge of the relevant facts.")*

The Code of Ethics (3 V.S.A. § 1203(a)(1)) states that all public servants must avoid any conflict of interest or the appearance of a conflict of interest. In sub section(3) of the same section, the Code defines a conflict as “a direct or indirect interest of a public servant or such an interest, known to the public servant, of a member of the public servant’s immediate family or household, or of a business associate, in the outcome of a particular matter pending before the public servant or the public servant’s public body, or that is in conflict with the proper discharge of the public servant’s duties. ‘Conflict of interest’ does not include any interest that is not greater than that of other individuals generally affected by the outcome of a matter.” If a conflict exists, the public servant must follow the steps set forth in the Code.

### **1. Does the Matter Present a Conflict of Interest for the Requester?**

In this case, significantly, the interests of the two State entities are co-aligned and not in conflict. Both the DHCD and the VSHA desire that the merger study be completed. Therefore, the Requester’s work for one entity is not necessarily in conflict with the other. Further, the Requester states that neither he, his immediate family, nor any business associate has any interest – direct or indirect – in the development of the study.

Based on the information provided, the Commission sees limited potential for actual conflicts of interest to arise in relation to the merger study. We say this with the understanding that neither the Requester nor a member of his immediate family or household, or a business associate, will personally benefit from the \$50,000 allocated by DHCD for the merger study, or the outcome of the study. This includes our understanding that the Requester will not receive any form of compensation above and beyond what he receives in the course of regular duties as VSHA Board Chair (per diem, mileage reimbursement etc..) in relation to the study.

### **2. Does the Matter Present the Appearance of a Conflict of Interest?**

With respect to the study, this leaves the “appearance” of conflicts of interest as they relate to the Requester’s dual roles with DHCD and VSHA, and the allocation of \$50,000 by DHCD to study the proposed merger of VSHA and VHFA. We agree that if the Requester moves forward with involvement in the merger study without proper disclosure, it could create the appearance of a conflict, particularly if he takes actions or make recommendations in relation to the merger study that are seen as being driven by priorities that are external to VSHA.

Please note, our recommendations here are limited to the matter of the allocation and expenditure of \$50,000 for the merger study and the Requester’s participation in the study, rather than the possible recommendations or outcome of the study, which are speculative at this time.

### **3. What Actions Should the Requester Take to Avoid the Appearance of a Conflict?**

When confronted by a conflict of interest, or the appearance of one, § 1203(b)(4) requires a public servant to either (1) recuse themselves from the matter and make a public statement regarding the recusal (which may be made by a statement to an immediate supervisor), or (2) if the public servant chooses to proceed with the matter, prepare a written statement regarding the nature of the conflict and file it according to the procedures established by the public servant’s agency or department.

In this case, the Requester has indicated that, if no actual conflict exists that would prevent him from acting, he plans disclose the issues in writing to both the VSHA Board and to the DHCD Commissioner,

and to recuse himself from all involvement in both merger study and the merger itself (if it goes forward) in his role as DCHD Deputy Commissioner until the matter is resolved.

**a. DHCD: Recusal from involvement in the merger study**

To help mitigate the risk of the appearance of a conflict of interest, the Ethics Commission agrees with the Requester's proposal to recuse himself from involvement in the merger study in his role as DHCD Deputy Commissioner. While the State Code of Ethics does not require written recusal, it does require a public disclosure of recusal on the matter based on the appearance of a conflict of interest.<sup>1</sup>

It is important to note that § 1203(b)(4) requires a recusal to be full and complete. This means that as DHCD Commissioner, the Requester should not act or participate in any way to influence decision-making regarding the merger study. This can include engaging in informal discussions with co-workers or subordinates who are involved in matters related to the study. The Requester should not delegate any task relating to the study (or the merger) to any subordinate at DHCD. To do otherwise could leave the Requester open to potential ethics complaints regarding directing unethical conduct under § 1203a (directing others to do what one cannot do themselves). Therefore, we recommend that the Requester disclose his recusal to other DHCD colleagues who have, or expect to have, responsibilities related to the merger/merger study, and request they do not attempt to engage with the Requester on this matter. To provide clarity, and for the Requester's own protection, we also recommend that this disclosure be in writing, and that the Requester maintain copies of the written disclosure.

**b. VSHA: Disclose the issue in writing to the Board**

To help mitigate the appearance of a conflict of interest, the Ethics Commission agrees with the Requester's proposal to disclose the appearance of a conflict to the VSHA Board in writing, which is required by § 1203(b)(4) when a public servant identifies a conflict, or the appearance of one. The written disclosure must include certain information, be written in a manner that can be understood by the public and be filed according to the rules established by the Board. A sample disclosure form can be found on the Ethics Commission's [website](#). The State Code of Ethics does not require the form to be posted publicly, however, the VSHA Board could institute this requirement if it wished. Regardless of whether the VSHA Board requires publication, the language of Code anticipates the disclosure will be made available to the public upon request.

**c. Other possible steps**

Any disclosures the Requester makes serves to lessen the appearance of a conflict of interest. Therefore, we encourage the Requester to consider going beyond the disclosure steps outlined above. For example, if the study is to be memorialized in writing, the Requester might ensure that a disclosure is included therein that identifies the potential conflict and explains that all actions undertaken with respect to the study were in the Requester's role as Chair of VSHA, and not on behalf of DCHD. The Requester should continue to look for opportunities for transparency and disclosure until the study is finalized.

**4. Future Participation in Merger Discussions on Behalf of VSHA**

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<sup>1</sup> Although written disclosure is not required, the Commission recommends written documentation of recusal based on conflicts of interest.

As the results and recommendation of the study are unknown at this time, it is impossible (or at least imprudent) for the Ethics Commission to provide guidance on potential participation in future merger discussions, should they occur. However, the Commission infers from the information provided by the Requester that merger discussions will only move forward if the results of the merger study suggests that a merger is in the best interests of both VSHA and VHFA. It is important to note that, depending on the recommendations of the study, other provisions of the Code may be implicated by the Requester's participation in future merger discussions. For example, even if no conflict of interest exists, the Code prohibits engaging in outside employment or activities "that are inconsistent, incompatible, or in conflict with the public servant's official duties." 3 V.S.A. § 1203(i)(a). Therefore, any future participation in merger negotiations on behalf of VSHA should ensure that the Requester's duties to DCHD take precedence. Upon completion of the study, the Commission is available to provide further, specific advice on the Requester's participation in merger discussions.

### **CONCLUSION**

Based on the facts received from the Requester, the Commission finds that the Requester's proposed course of conduct would not violate the State Code of Ethics. However, the Requester is advised to seek further advice from the Office of the Governor and the Executive Branch Department of Human Resources as to whether his proposed course of conduct would violate the Executive Code of Ethics or Executive Branch or agency rules or policies that may require a more stringent standard of ethical conduct. The Requester is also encouraged to seek further advice or guidance from the Ethics Commission if any changes are made to his proposed course of conduct.

### **Disclaimer**

This Advisory Opinion is strictly limited to the facts stated herein and relates only to the application of the State of Vermont Code of Ethics. Under the Code of Ethics, Advisory Opinions are based on the representations made by, or on behalf of, a State of Vermont public servant and are not adversarial or investigative proceedings. The Ethics Commission offers no opinion on the effect any other statute, regulation, ordinance, constitutional provision, charter provision, or canon of professional ethics, other than the ones referenced above, may have on this situation.

### **Code Citations**

§ 1203  
§ 1203a  
§ 1203b  
§ 1203i

### **Related Advisory Opinions**

None

### **Keywords**

Conflict of Interest  
Appearance of Conflict of Interest